Supreme Court, U.S.
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No. 93-6892

In The Supreme Court of the United States

October Term, 1993

Matthew Wayne Tome,
Petitioner,

v.

United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 24, 1993
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INDEX

	Page
Docket Entries	1
Superseding Indictment	2
Transcript of Proceedings:	
Testimony of Andrea Tome, Witness on Behalf of Government, Cross-Examination	4
Argument of Prosecutor Seeking Admission of Testimony of Lisa Rocha under Fed.R.Evid. 801 (d) (1) (B)	6
Cross-Examination of Lisa Rocha by Defense Counsel Out of Presence of Jury	8
Trial Court Ruling Admitting Testimony of Lisa Rocha under Fed. R. Evid. 801 (d) (1) (B)	9
Objection by Defense Counsel to Court's Ruling Admitting Testimony of Lisa Rocha under Fed.R. Evid. 801 (d) (1) (B)	10
Argument of Prosecutor Seeking Admission of Testimony of Beverly Padilla and Trial Court Ruling Admitting That Testimony under Fed.R. Evid. 801 (d) (1) (B)	11
Testimony of Lisa Rocha, Witness on Behalf of Government, Direct Examination	11
Discussion of Court, Prosecutor, and Defense Counsel of Admissibility of Testimony of Dr. Karen Kuper and Trial Court Ruling Admitting That Testimony under Fed.R.Evid. 801 (d) (1) (B)	12
Testimony of Dr. Karen Kuper, Witness on Behalf of Government, Direct Examination	14
Testimony of Dr. Laura Reich, Witness on Behalf of Government, Direct Examination	15
Testimony of Kae Ecklebarger, Witness on Behalf of Government, Direct Examination	16
Testimony of Beverly Padilla, Witness on Behalf of Government, Direct Examination	19

INDEX—Continued

	Page
Testimony of Dr. Jean Spiegel, Witness on Behalf of Government, Re-Direct Examination	20
Opinion of United States Court of Appeals for the Tenth Circuit, August 26, 1993	21
Order of Supreme Court of the United States granting certiorari & leave to proceed in forma pauperis, February 27, 1994	42

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/4/91	INDICTMENT.
3/3/92	Jury selection and trial.
3/3/92	JURY INSTRUCTIONS. (SEALED)
	GENERAL VERDICT: GUILTY of Aggravated Sexual Assault as charged in Indictment.
	SPECIAL VERDICT. (SEALED)
5/22/92	JUDGMENT.
6/1/92	NOTICE OF APPEAL by deft from Judgment entered 5-22-92.
6/18/92	NOTICE OF APPEAL by Govt from Judgment entered 5-22-92.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 91-314 SC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MATTHEW WAYNE TOME,
Defendant.

---

18 U.S.C. 1153 and 18 U.S.C. 2241(c) and 18 U.S.C. 2245(2)(A)(B): Crime on an Indian Reservation: Aggravated Sexual Abuse of a Minor.

SUPERSEDING INDICTMENT

The Grand Jury charges:

Commencing on or about the months of June and July, 1989, the exact dates being unknown to the Grand Jury, within the exterior boundaries of the Navajo Indian Reservation, in or near the town of Mitten Rock, New Mexico, in Indian country, the defendant MATTHEW WAYNE TOME, an Indian, knowingly engaged and attempted to engage in sexual acts to wit: contact between the penis and the vulva, contact between the mouth and the penis, contact between the mouth and the vulva and penetration of the genital opening by hand and finger with intent to abuse, humiliate, harass, degrade, arouse and gratify the sexual desire of any person, with a female Indian child, who had not then attained the age of 12 years.

In violation of 18 U.S.C. §§ 1153, 2241(c), 2245(2)(A)(B).

A TRUE BILL:

/s/ Carl A. Montoya
Foreperson of the Grand Jury

/s/ [Illegible]

WILLIAM L. LUTZ
United States Attorney

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 91-314 SC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MATTHEW WAYNE TOME,
Defendant.

TRANSCRIPT OF PROCEEDINGS

* * * *

TESTIMONY OF ANDREA TOME,
WITNESS ON BEHALF OF GOVERNMENT,
CROSS-EXAMINATION

* * * *

[116] Q What other kinds of things did you do at your real dad's house besides go to preschool?
A Just play.
Q Just play. What kind of things did you play?
A I didn't have no one to play with.
Q Did you just play by yourself then?
A Yes.
Q Did you have any toys there?
A Yes.
Q When you stayed at your real mom's, did you have people to play with there?
A Yes.
Q Was it better to stay with her than your real dad because you had people to play with? Do you know?

* * * *

[132] Q Andrea, when you lived with Matthew, did your mother live in Colorado some of the time?
A Yes.
Q And did she seem far away to you?
A Yes.
Q When you lived with Matthew and your mother lived in Colorado, you couldn't vist with your mom, could you?
A No.
Q Did you miss your mom when she lived in Colorado?
A Yes.
Q Did you want to be with her?
A Yes.
[133] Q When you lived with your mom in Colorado, did Matthew ever come to visit you there, do you remember?
A (No audible response).
Q Did Matthew ever come to Colorado?
A No.
Q Did you miss Matthew when you were in Colorado?
A No.

* * * *

[142] Q When you lived with Matthew were you afraid that you wouldn't see your mom again? Were you ever afraid of that?
A (No audible response.)
Q Have you ever been afraid, Andrea, that something might happen and you wouldn't see your mom again? Ever been afraid of that?
A (No audible response.)
Q Sometimes afraid of that, do you know?
A (No audible response.)
Q Andrea, when you go to court, do you think anything is going to happen to your mom?
A Yes.
Q What do you think is going to happen to her?
A My mom might go to jail.

[143] Q Why do you think that?

A I don't know.

Q Do you think anything is going to happen to Matthew when you go to court? Do you think anything is going to happen to him, do you know?

A (No audible response.)

Q Don't know?

A (No audible response.)

Q Andrea, do you think anything is going to happen to you when you go to court?

A I might go back to my real dad.

Q Are you afraid of that?

A Yes.

* * * *

ARGUMENT OF PROSECUTOR SEEKING ADMISSION OF TESTIMONY OF LISA ROCHA UNDER FED.R.EVID. 801(d)(1)(B)

[164] MS. NEDA: Padilla. Initially Lisa Rocha was offered under rule of evidence 803, 24, under the residual hearsay rule. The Court has been cited some case law on that. However, I believe—

THE COURT: Please face the Court when you are addressing the Court.

MS. NEDA: I'm sorry. However, I believe that another rule is applicable at this point, and that is Rule 801(D)1(b) prior consistent statements, your Honor.

THE COURT: 801(B)1(b).

MS. NEDA: No, (D)1(b). The rule that I am referring this Court to under 801(D)1(b) is prior statement of a witness. There are prior statements made by this witness to which Lisa Rocha, the mother and others can [165] testify, that are consistent with the declarant's testimony, and they are offered to rebut an express or implied charge against this declarant of either recent fabrication, but in this case they're offered to rebut the inference of an improper influence or motive by this child.

And this is arisen in two ways, your Honor. The opening statement of the defense was—the opening words were this case is about false accusations in a custody battle. It's expressed in that, not merely implied or inferred, that the witness was to give false testimony because of a custody battle.

There was also statements in the opening statement by the defense, your Honor, that what this child has been doing is repeating a fairy tale like Goldie Locks, the more she repeats it, the more she believes it.

Therefore, in the opening statement, the expressed statements of the defense were that the child had fabricated or was under improper influence or motive, and therefore, I offer the testimony of the witnesses under that rule. However, the cross-examination of the witness has always opened the door to permit prior consistent testimony—or statements, rather.

And that is that the defense has asked this witness whether she's been spanked by her father and didn't she not like that, and she doesn't want to go back to her [166] father.

Again, she has raised the inference of improper motive. She's asked if she's talked to her mother. Who else she talked to. It raises the inference of improper influence. I believe the opening statement stands on its own and permits prior consistent statement. But I believe the very lengthy cross-examination—I timed the total cross-examination to last an hour and 15 minutes, including Monday.

And I believe that during that very lengthy cross-examination, the door has been opened to permit 801(D)1(b) evidence. In addition to 803, 24, which I did file a notice to permit Lisa Rocha and Kae Ecklebarger to talk to concerning prior statements of the child.

There is case law that I can cite to the Court at this time, should it so desire, permitting 801(D)1(b) testimony to be offered in the case in chief where the cross-

examination has raised either expressly or implicitly improper influence.

* * * *

CROSS-EXAMINATION OF LISA ROCHA
BY DEFENSE COUNSEL
OUT OF PRESENCE OF JURY

[209] Q And that was the full extent of any and all discussions you had with Andrea regarding what took place between her and her father?

A Yes. I have not questioned her any further.

Q And how do you happen to recall that it was the 27th when you had the second discussion with Andrea?

A Because I remember it was on that Monday following that Wednesday when I had talked to her.

Q And Beverly had called you over specifically to discuss this incident and to go through it with Andrea; is that right?

A Beverly told me that Andrea would not speak with her about it and that Andrea said that she would speak to me about it, so she asked me to come over.

Q But it was specifically done to discuss what happened?

A Yeah. She asked me to come over to try to figure out what Andrea had meant, because Andrea would not speak to her at all.

Q And by—Andrea meant by sleeping with her father?

A Excuse me.

Q By my father treated me like a wife, that's what you were going to go in to try and find out—

A I went to go—she didn't say sleeping with my [210] father. She said, My father gets drunk and he thinks I am his wife. That was her statement.

Q And that's what you were going to explore on the 27th?

A I went to go ask her what she meant by that statement.

MR. GANDERT: I have nothing further, your Honor.

THE COURT: Anything further?

MS. NEDA: Not on this hearsay issue, no, sir.

THE COURT: All right. Ms. Rocha, you may step down, and you may wait in the witness waiting room.

(WHEREUPON, witness exited courtroom.)

* * * *

TRIAL COURT RULING ADMITTING
TESTIMONY OF LISA ROCHA
UNDER FED. R. EVID. 801(d)(1)(B)

THE COURT: I'm going to allow the testimony of this witness regarding the August 22nd and August 27th, 1990, conversations with Andrea.

Insofar as the August 22nd statement, I will allow that on alternative grounds, that is, 803, sub 24 and 801(D)1(b). Insofar as allowing her to testify under 803, 24, I'm going to rule at this time that there are circumstantial guarantees of trustworthiness insofar as that statement of Andrea is concerned, in that those circumstances are equivalent to the circumstances which are treated and which permit hearsay statements under 803, sub 3.

[211] These relate to the declarant's existing state of mind, emotion, sensation and so on, relate to motive, a statement which apparently was spontaneous, unsolicited by Ms. Rocha, the baby-sitter, in which the child is asking the aid of a person who apparently she felt was a friend in keeping her or having that person intercede for her with her mother so that she, Andrea, wouldn't have to go to New Mexico to be with her father.

Under 801(D)1(b), I feel that there has been an implied charge that the—that either the declarant was making these statements because of an improper motive, that is because she did not want to be with her father, wanted to be with her mother. And the statements of August the 22nd are consistent with the declarant's testimony and will be admitted to rebut the implied charge of either recent fabrication or improper motive.

Insofar as the August 27th statement is concerned, I'm going to admit that under 801(D)1(b) for the reasons that I have stated insofar as the August 22nd statement is concerned. I don't believe that the August 27th statement qualifies under 803, sub 24.

Okay. That takes care of Ms. Rocha. How long will it take—well, let's see.

* * * *

OBJECTION BY DEFENSE COUNSEL TO COURT'S RULING ADMITTING TESTIMONY OF LISA ROCHA UNDER FED. R. EVID. 801(d)(1)(B)

MS. STEINMETZ: Could I just say something briefly for the record, your Honor?

[212] THE COURT: Sure.

MS. STEINMETZ: Is that when there's a question of motive of a witness or implication of recent fabrication or in this case whether the—who's telling the truth, it seems to me that that's always an issue in a case. And if 801(D)1(b), that is, other statements are allowed to come in because it's just the issue in every single case, then that exception would apply in every single case, and that's not the purpose of the exception.

THE COURT: I'm applying it in this case insofar as Ms. Rocha is concerned.

MS. STEINMETZ: I just want to state that for the record that the issues we have are no different than those in every other case and that there has to be some other reason why that exception applies. Otherwise, the Government, defense, whoever uses that rule can bolster every single statement of every single witness with whatever self-serving statement they want.

* * * *

ARGUMENT OF PROSECUTOR SEEKING ADMISSION OF TESTIMONY OF BEVERLY PADILLA AND TRIAL COURT RULING ADMITTING THAT TESTIMONY UNDER FED. R. EVID. 801(d)(1)(B)

[213] MS. NEDA: I indicated to the Court that most of the testimony of the mother, of Beverly Padilla, is not hearsay, but there is the one statement the mother did overhear while she was in the next room of the apartment.

On August 27th she did hear her child say that her father forced her legs apart. It is not hearsay underneath the Court's ruling 801(D)1(b), but I do bring it to the attention of the Court because she does intend to mention that to the Court.

THE COURT: If she testifies that way, I will admit that testimony as I will admit the testimony of Ms. Rocha under 801(D)1(b).

* * * *

TESTIMONY OF LISA ROCHA, WITNESS ON BEHALF OF GOVERNMENT, DIRECT EXAMINATION

[218] Q All right. And do you recall the month of August 1990, Andrea saying something to you regarding Matthew Tome?

A Yes, I do.

Q Tell us what date that was, to the best of your recollection?

A The 22nd.

Q Of August 1990?

A Yes.

Q And on that day were you baby-sitting Andrea Tome?

A Yes, I was.

Q All right. And what happened during that day?

A She came to me and she told me, Please don't let my mom take my back to my father. And I asked her

why, and she said, Because I don't want to go back. And I asked her [219] why again, and she said, Because my father gets drunk and he thinks I'm his wife.

* * * *

[222] Q So did you talk to Andrea?
A Yes, I did.
Q And what did you say to her?
A I asked her to explain to me what she meant by, my dad thinks I'm his wife.
Q And did she respond?
A Yes, she did.
Q What did she say?
A She said that my father does nasties to me.
Q Did you ask her what that meant?
A Yes, I did.
Q What was her answer?
A She started explaining to me that her father would drag her, drug her through the house by her arms like this, took her into the bedroom and took her clothes off, laid her on the bed. She crossed her legs and that he forced her legs open. He laid on top of her, and she got a sharp pain down towards like her stomach area, and then that she was crying for her mother and her father said, Your [223] mother's a bitch. And then that when he got finished, she got up and she went to the bathroom and she wiped herself and there was blood on the tissue.

* * * *

DISCUSSION OF COURT, PROSECUTOR, AND DEFENSE COUNSEL OF ADMISSIBILITY OF TESTIMONY OF DR. KAREN KUPER AND TRIAL COURT RULING ADMITTING THAT TESTIMONY UNDER FED. R. EVID. 801(d)(1)(B).

[246] MS. NEDA: Dr. Kuper is going to testify to getting the physical, I mean getting the history of the child concerning her complaint. She did an interview of the child, and then she did a physical exam. She will be testifying to both.

THE COURT: What will she—
MS. NEDA: The child was penetrated both digitally by the hand and by the penis, and I have case law.
THE COURT: No, that brings up the question as to whether—
MS. NEDA: Of course, it would also be admissible under 801(B)1—801(D)1(b), but it's under 803, 4.
THE COURT: So insofar as four is concerned, that is 803, 4, should it not be—if it were not admissible under any other exception, shouldn't there be a limiting instruction insofar as the statement of how—of what happened that is to be considered only for purposes of the doctor's opinion in respect to whether or not she was penetrated but to not prove the truth of the fact?
MS. NEDA: Yes.
MS. STEINMETZ: I think the limiting instruction [247] is that it was only taken in the course of a medical history, because I don't think that you can—the doctor can't give an opinion as to the ultimate issue in the case.
THE COURT: No, the ultimate issue in this case is did he abuse her sexually. Now, she says that he penetrated her digitally and otherwise. Should that—that's medical history that the doctor takes.
MS. STEINMETZ: Right, medical history.
THE COURT: Should there not be a limiting instruction as to that, in other words, that the medical history can be considered only for the purpose of not proving that he penetrated her digitally and otherwise, but only for the purpose of establishing foundation for his opinion that she was in fact penetrated.
MS. NEDA: The answer is yes, your Honor. However, this testimony is also offered under the prior consistent statement which is—
THE COURT: 801(D)1(b), dog, boy.
MS. NEDA: That's right. I have to get that straight. In that case it's not hearsay, but should I offer it solely under 803, 4, the Court is correct, the responses during the course of the interview were not offered for the truth

of their content. However, it's being offered as non-hearsay under 801(D)1(b).

THE COURT: How do we handle that before the [248] jury? I am inclined to go along with you on 801(D)1(b).

MS. STEINMETZ: We're in the same position we were before, Judge, is that what they are offering it for is to bolster the credibility given in court, and they are saying it's a prior consistent statement. They are saying it's a prior statement, it's consistent with what she said in court.

THE COURT: I wouldn't admit it under 801 if you hadn't thrust in that direction, that is recent fabrication or improve motive, and that is implied in the manner in which you conducted your examination.

MS. STEINMETZ: But that's the issue in every single case.

THE COURT: Well, I'm going to admit it under 801(D)1(b), and I don't know what we should do about a limiting instruction under 803, 4.

MS. NEDA: I would offer it so that we can offer it under 801(D)1(b) non-hearsay.

MS. STEINMETZ: I still have the confrontation clause issue under *Idaho versus Wright*, and the trustworthiness giving a statement, I'll just say that for the objection.

(WHEREUPON, bench conference concluded.)

* * * *

TESTIMONY OF DR. KAREN KUPER,
WITNESS ON BEHALF OF GOVERNMENT,
DIRECT EXAMINATION

[255] Q Would you please state precisely the question you asked of the child and the answer she would give and just go in chronological order that the interview was conducted?

A Certainly. I always begin with a very open-ended question, and my question was, Has anyone ever touched you in a way that hurt or was scary and her answer was, Just my dad. I then asked, What did he do? Andrea said, He touched me.

And I asked where. And Andrea said, Here. She was holding a doll that we have in our play room, and she was pointing to the vaginal area on the doll.

I then said, What did he do? Andrea said, He put his fingers inside me. I said, How did it feel? And she said, It hurt and I was scared.

[256] I then said, Did he touch you with anything else? Andrea said, His thing. I said what, Do you mean "his thing?" She again could not tell me what his thing was, but she again had the dolls and she pointed to the doll's genital area.

I then asked her, What did he do with his thing? And Andrea said, He put it inside of me. I asked where, and she then pointed to the doll's vaginal area.

Q After you conducted this interview of the child—well, let me ask you first. Was the mother present during the interview of this child?

A Yes, she was.

Q And where was she while you were talking to the child?

A She was in the same room. Andrea was lying on the exam table. Her mother was sitting behind me in one of the chairs in the room.

* * * *

TESTIMONY OF DR. LAURA REICH,
WITNESS ON BEHALF OF GOVERNMENT,
DIRECT EXAMINATION

[291] Q Dr. Reich, after you asked the child concerning personal history, did the child respond in any way to you?

A Yes. She was extremely open with me through the entire exam and pre-exam, very calm, and told—

THE COURT: Just a moment.

MS. STEINMETZ: I'm sorry, your Honor. For the record, I have to just state I have the same objections that I had to the previous doctor that testified as to this witness also.

THE COURT: All right, let's proceed.

BY MS. NEDA:

Q Would you start that answer again.

[292] A Yes. She was extremely open. She was extremely calm during the examination and very friendly and said that her father had put his thing in her.

Q Did you go into the interview any further than that?

A No. She and her mother had said that—well, she said she talked to others about it. I asked her if she had talked to others, and she said yes. And her mother said that they talked—that social services had been involved, that they had seen Dr. Kuper a few days previously and that she had also talked to her.

And so I felt at that point that the child had been through enough in terms of discussing it and that what was important for me was to examine her at that point.

* * * *

TESTIMONY OF KAE ECKLEBARGER,
WITNESS ON BEHALF OF GOVERNMENT,
DIRECT EXAMINATION

[317] Q Now, tell us what she told you Matthew did to her in detail?

A She told me, to quote, that he had, quote, put his balls in her.

MS. STEINMETZ: Excuse me. I'm sorry, Ms. Ecklebarger. I have to object for the record to this hearsay part. I think I have to do that at this point, your Honor.

THE COURT: All right. Overruled. Let's proceed, go ahead.

BY MS. NEDA:

Q I'm sorry, Ms. Ecklebarger, please continue.

A She stated that he had, and in her words were, quote, put his balls in me, end quote. I at that point asked her where this had happened, and she said that it had happened at her grandma Sadie's house where she and Matthew were with her grandma and grandpa and that her aunty Sheba [318] also lived there.

She specified that none of the other three adults were home during the incident that we were going to talk about. And I had asked her if she could remember, you know, one specific times that we were talking about. We were talking about one incident, and she said that she could remember this one time especially clearly.

And she went on to describe to me that he had told her to take her clothes off. That she had told him no. That he then removed her panties and put her down on the floor and that he had put his balls in her.

At that time I brought the anatomical dolls out and asked her if she could show me with the dolls what he had done. She undressed the male doll and took the panties off of the little girl doll, and then she placed the little girl doll down on its back, put the male adult doll on top of it. Took the penis of the male adult doll and attempted to insert it into the little girl doll and was moving the doll upside down.

She then began—she was reaching down—

Q Let me stop you. Where did the child place the penis?

A In the vagina area of the little girl doll.

Q All right. And you said she moved the doll. How did she move the doll?

[319] A She moved the male doll up and down on top of the female doll.

Q All right. Go ahead.

A Where was I? She then—she was then—she had reached down and was doing something with the legs of the little girl doll. And I said, What are you doing? And

she was trying to cross them and keep them crossed, and she was taking the hand of the male doll and trying to shove the legs apart. And she got frustrated and she said, I tried to keep my legs closed so he couldn't put his balls in me.

And then she kind of pushed the dolls away and laid down on the floor, and she put her legs out straight and crossed them and said, I had any legs out crossed like this. And then she said when she grabbed them, she said she reached and grabbed her own ankles and pulled them apart and then pulled her ankles up to her buttocks so her knees were in the air and then pushed her knees apart and said, and then he did this and then he put his balls in me.

Q Did Andrea tell you whether or not Matthew kissed her?

A Yeah. She said that he kissed her all over her body and that specifically he kissed her on the vaginal area. She pointed to that area of the doll. She also said that he had asked her to touch him and that she had refused. When I asked her where he had asked her to touch [320] him, she pointed or she touched the penis area on the male doll.

Q Did Andrea tell you what she did after Matthew did this to her?

A Yes. She said that afterwards she had gone to the bathroom, and that when she had wiped herself, that there was blood on it. And that she had kept that and that when her grandmother and aunty came home, that she went and showed them and said, Look what Matthew did to me.

And she said at that point that her grandmother had said, If he does it again, I'm going to haul him away. She said later that her grandmother confronted Matthew and that she was there and that Matthew turned to Andrea and said, It's all your fault. And Andrea said, No, it isn't, it's all your fault.

* * * *

[326] Q Ms. Ecklebarger, did the child Andrea Tome tell you that Matthew did this more than once?

A Yes, she did.

Q What were her words?

A Well, what she said was—I had asked her what had made him stop. It was after she had talked about grandma saying that if he did it again, that she would have him hauled away. And she said, Well, grandma said that she would have him hauled about, but he didn't stop, he did it every single day and then he stopped.

* * * *

TESTIMONY OF BEVERLY PADILLA, WITNESS ON BEHALF OF GOVERNMENT, DIRECT EXAMINATION

[406] Q And after you talked to Lisa Rocha on the telephone, did you try to talk to your daughter that time?

A Yes.

Q And would your daughter talk to you?

A No.

Q What did she do?

A That Monday she told me to ask me what she meant by when her father got drunk and thought of her as his wife, [407] and she just stood there and said nasties and I asked her, "What do you mean by nasties?"

MR. GANDERT: Your Honor, I object to hearsay.

THE COURT: Overruled. Go ahead.

A And I told her to explain to me what she meant and she didn't want to tell me. She just started crying and so I said, "If you won't tell me, would you tell Lisa?" And she said, "Yeah."

* * * *

[408] Q So did Andrea talk to Lisa Rocha?

A Yes, she did.

Q And do you remember hearing anything that Andrea said?

A The—

MR. GANDERT: Your Honor, I object. I believe this is hearsay.

THE COURT: Overruled.

BY MS. NEDA:

Q Do remember anything that your daughter said to Lisa Rocha?

A Only pulling her legs apart when her dad was trying to pull it open.

* * * *

TESTIMONY OF DR. JEAN SPIEGEL,
WITNESS ON BEHALF OF GOVERNMENT,
RE-DIRECT EXAMINATION

[509] Q What did she tell you?

A She didn't volunteer any information.

Q Did she tell you anything at all?

A I had to directly ask her.

Q What did you ask her?

A She was very shy and quiet and I asked her where her body was touched.

Q Did she indicate it?

A Yes, she said that her breasts were touched and her front privates were touched, and she also told me that her bottom where her poop comes out was touched.

* * * *

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-2104

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW WAYNE TOME,
Defendant-Appellant.

Aug. 26, 1993

Before ANDERSON, HOLLOWAY, and TACHA, Circuit Judges.

TACHA, Circuit Judge.

Matthew Wayne Tome ("Tome"), a Native American residing on the Navajo Indian Reservation in New Mexico, was convicted of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A), (B). Mr. Tome appeals his conviction, challenging the admission of certain hearsay testimony and the government's use of leading questions. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

A.T. is the daughter of the defendant and his ex-wife, Beverly Padilla. A.T. was born on June 18, 1985. Tome and Padilla divorced in September 1988. The Navajo Tribal Court awarded Tome and Padilla joint custody of

A.T. but granted Tome primary physical custody. From September 1988 until May 1989, Tome had custody of A.T. on weekdays while Padilla had custody on weekends. Tome and Padilla alternated custody of A.T. every two weeks during the summer of 1989, with Padilla having custody from June 16 to June 30, 1989.

In August 1989, Padilla petitioned the Navajo Tribal Court for primary custody of A.T. The Tribal Court denied the petition but awarded Padilla custody during the summer of 1990. At this time, Padilla had remarried and was living in Colorado. A follow-up custody hearing was scheduled for August 24, 1990. Padilla and A.T., however, did not attend that hearing. Rather, on August 27, 1990, Padilla contacted Colorado authorities with allegations that A.T. had been sexually abused by her father, Tome. On August 22, 1991, a superseding indictment charged Tome with knowingly engaging in sexual acts with his daughter, an Indian child under the age of twelve, in violation of 18 U.S.C. § 1153, 2241(c) and 2245(2)(A), (B). In a Bill of Particulars filed September 10, 1991, the government alleged that the conduct in question occurred on or about June 18, 1989, when A.T. was four years old. Tome's trial began on February 24, 1992.

The government called A.T. as its first witness. She was six and one-half years old at the time of trial. After the court extensively questioned A.T. concerning her ability to distinguish the truth from a lie, she testified before the jury. On direct examination, her testimony consisted mostly of one and two-word answers. In addition, the trial judge permitted the prosecutor to use leading questions to develop A.T.'s testimony pertaining to the alleged sexual abuse. The prosecutor asked mainly "yes or no" questions and also had A.T. demonstrate details of the abuse by using dolls and having A.T. point to parts of the prosecutor's body. Through these means, A.T. testified that Tome removed her clothes, got on top

of her, and put his private place where she goes potty and in her mouth. She further testified that after this happened she went to the bathroom and wiped blood off herself with a tissue.

A.T.'s cross-examination occurred over two days, beginning on a Monday afternoon and resuming the following Wednesday morning. On the first day, defense counsel covered numerous topics all unrelated to the alleged abuse. She first established that A.T. knew the prosecutor on a first-name basis but did not know the judge or any of the defense counsel. She then questioned A.T. about the difference between living with her father in New Mexico and her mother in Colorado, focusing on the reasons she might have for wanting to live with her mother. A.T.'s responses to these question on the first day were immediate and ranged from single word responses to complete and relatively detailed sentences.

When A.T.'s cross-examination resumed two days later, it was strained. Almost from the start, when defense counsel asked A.T. about any conversations she had had with the prosecutor on Tuesday, A.T. often provided no audible response. Defense counsel then asked A.T. if she missed her mother when staying in New Mexico and asked her what she thought might happen to her or her mother when they went to court. A.T. testified that she did miss her mother and that she thought that she would be returned to her father while her mother went to jail. After a recess, defense counsel asked A.T. whether she had discussed the alleged abuse with anyone besides the prosecutor and, if so, whether she knew the occupations of those persons. A.T. testified to discussing the matter with several physicians and social workers and stated that their jobs were "to help kids." On recross-examintion, when A.T. was asked to describe her testimony on direct examination, she answered that it was "the truth." Defense counsel chose not to ask A.T. about the details of the alleged sexual abuse.

The government also produced several witnesses who testified about statements A.T. made to them. The first witness was Lisa Rocha, A.T.'s baby-sitter and a close friend of A.T.'s mother. Rocha testified that, while she was baby-sitting A.T. on August 22, 1990, A.T. spontaneously told her, "Please don't let my mom take me back to my father." Rocha testified that, when asked why, A.T. remarked that her "father gets drunk and he thinks I'm his wife." Rocha told Padilla about this incident five days later, on August 27, 1990, at which time she and Padilla attempted to question A.T. further about her accusations. When A.T. would not speak with her mother. Padilla left the room. Rocha testified that A.T. said that her father "does nasties to me," which consisted of taking her clothes off, forcing her legs open, and causing a sharp pain in her stomach when he laid on top of her. Finally, Rocha testified that A.T. related going to the bathroom and wiping blood off herself with a tissue.

Next to testify for the prosecution was Dr. Karen Kuper, a pediatrician in Colorado Springs. Kuper testified that Kae Ecklebarger, a Child Protection Service's caseworker, referred A.T. to her office. Kuper examined A.T. on two occasions in September and October 1990. As part of A.T.'s examination, Kuper interviewed her using anatomically correct dolls. Kuper testified that A.T. told her that her father hurt and scared her by putting his fingers and his "thing" in her vagina. When asked what his "thing" was, A.T. pointed to the doll's genital area. Kuper also testified that A.T. had an enlarged vaginal opening and an abnormally thin rim of hymenal tissue, and that these physical characteristics were consistent with vaginal penetration.

The testimony of Dr. Laura Reich, Chief of Pediatrics at the El Pomar Community Health Center in Colorado Springs, followed. Reich examined and interviewed A.T. on September 21, 1990. Reich testified that A.T. said that "her father had put his thing in her." Reich further

testified that A.T.'s hymen was not intact, that her vaginal opening was larger than normal, and that she had an extensive vaginal rash. Reich also testified that A.T.'s physical characteristics were consistent with vaginal penetration.

The government's next witness was Kae Ecklebarger, who was a caseworker in the Colorado Springs Child Protection Services office at the time she interviewed A.T. on August 29, 1990. Ecklebarger testified that A.T. said that her father removed her panties, put her down on the floor, and "put his balls" in her. Ecklebarger stated that A.T. demonstrated intercourse with anatomically correct dolls, attempting to insert the male doll's penis into the female doll and moving the male doll up and down on top of the female doll. Eckelbarger further testified that A.T. stated that her father kissed her on her vaginal area and asked her to touch his penis. Finally, Ecklebarger testified that A.T. said that she wiped blood from herself with a tissue, kept the tissue, and later showed it to her grandmother, saying, "Look what Matthew did to me."

A.T.'s mother, Beverly Padilla, also testified for the government. She stated that she was in the next room when Rocha was talking to A.T. on August 27, 1990. Padilla testified that she heard A.T. tell Rocha about her father pulling her legs apart.

The final witness to relate A.T.'s out-of-court statements was Dr. Jean Spiegel, a pediatrician at the University of New Mexico. Spiegel examined A.T. on September 3, 1991, when A.T. was six years old and almost two years after the abuse allegedly occurred. Spiegel testified that A.T.'s vaginal opening was abnormally large and that she had very little hymen left. She stated that these physical characteristics were consistent with chronic vaginal penetration. On redirect examination, Spiegel testified that A.T. stated that her father touched her breasts, her "front privates," and "her bottom where her poop comes out."

On March 3, 1992, after Tome testified and presented his own evidence and witnesses, the jury convicted him on all counts. On appeal, Tome alleges the following errors: (1) the admission of alleged hearsay testimony in violation of the Federal Rules of Evidence and the Sixth Amendment's Confrontation Clause; (2) the improper use of leading questions to elicit A.T.'s testimony on direct examination; and (3) cumulative error and a fundamentally unfair trial.

II. A.T.'s Out-of-Court Statements

Tome challenges the testimony of six witnesses concerning A.T.'s out-of-court statements to them: Rocha, Ecklebarger, Padilla, Kuper, Reich, and Spiegel. In our analysis, we address whether the trial court properly admitted the testimony under the Federal Rules of Evidence and, if so, whether that testimony nevertheless violated Tome's rights under the Confrontation Clause.

A. *Federal Rules of Evidence*

The decision to admit evidence is within the sound discretion of the district court. *United States v. Zimmerman,* 943 F.2d 1204, 1211 (10th Cir.1991). We accord heightened deference to the trial court's hearsay rulings. *See United States v. Johnson,* 971 F.2d 562, 571 (10th Cir.1992).

The government proffered the challenged testimony of everyone but Ecklebarger as not hearsay under Fed.R. Evid. 801(d)(1)(B), contending that the defense had implied, during its cross-examination of A.T., that she had fabricated the allegations of abuse in order to live with her mother in Colorado.[1] The government also contended

[1] Rule 801 defines as hearsay "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). The Rule further provides that a witness's prior statement

that, even if the proffered testimony were hearsay, it all fell within one of two hearsay exceptions. The government offered the testimony of Doctors Kuper, Reich, and Spiegel under Fed.R.Evid. 803(4) as statements made for the purpose of medical diagnosis or treatment and the testimony of Rocha, Padilla, and Ecklebarger under Rule 803(24)'s "catch-all" exception as having adequate circumstantial guarantees of trustworthiness. We conclude that the testimony of all six witnesses[2] was admissable as not hearsay under Rule 801(d)(1)(B) and therefore do not address the Rule 803 hearsay exceptions.

Under Rule 801(d)(1)(B), evidence of a witness's prior consistent statement is not hearsay if the witness is subject to cross-examination concerning his prior statement and it is offered to rebut an express or implied charge of recent fabrication or improper motive. *See United States v. Sutton,* 732 F.2d 1483, 1493-94 (10th Cir.1984), *cert. denied,* 469 U.S. 1157, 105 S.Ct. 903, 83 L.Ed.2d 919 (1985). Tome contests the admission of the statements under Rule 801(d)(1)(B) on the grounds that (1) A.T. was not "subject to cross-examination concerning the statement," (2) defense counsel's attempt to cross-examine A.T. did not amount to a charge of recent fabrication or improper motive, and (3) the statements did not fall within the proper scope of the rule because they were made after the declarant had a motive to lie.

is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *Id.* Rule 801(d)(1)(B).

[2] Although the applicability of Rule 801(d)(1)(B) was a recurring evidentiary issue, the government failed to expressly offer Ecklebarger's testimony as nonhearsay under the rule. This court, however, "is not bound by the evidentiary basis relied upon by the trial court for the admission of the challenged evidence." *Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1331 (10th Cir. 1984).

(1) Subject to Cross-Examination

We first address Tome's contention that A.T. was not subject to cross-examination as required by the rule because she was unresponsive to certain questions. The Supreme Court addressed Rule 801's cross-examination requirement in *United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988), which involved a prison officer who suffered severe memory impairment after he was attacked and beaten with a metal pipe. *Id.* at 556, 108 S.Ct. at 841. The officer identified his assailant to an FBI agent. At the assailant's trial, however, the officer testified that, while he remembered identifying the assailant, he could not now remember seeing his attacker. *Id.* The court examined the testimony under Rule 801(d)(1)(C), which has the same cross-examination requirement as Rule 801(d)(1)(B). In what it deemed "the more natural" reading of the cross-examination requirement, the Court stated that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." *Id.* at 561, 108 S.Ct. at 844. The Court then concluded that the witness was subject to cross-examination notwithstanding his forgetfulness because he answered questions regarding his prior statements and the factfinder could evaluate his prior statements in light of his present inability to remember the factual basis underlying them. *Id.* at 562, 108 S.Ct. at 844.

We first note that the Rule 801(d)(1) standard is not identical to that contained in the Sixth Amendment's Confrontation Clause. *See United States v. DiCaro*, 772 F.2d 1314, 1325 (7th Cir.1985) (citing *Dutton v. Evans*, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970)), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458, 89 L.Ed.2d 716 (1986). The Confrontation Clause, which we discuss below, protects the accused's right to "an opportunity for effective cross-examination." *See Owens*, 484 U.S. at 559, 108 S.Ct. at 842. In contrast, Rule 801(d)(1) requires

that the witness be subject to cross-examination concerning the prior consistent statement only. The Rule does not require cross-examination concerning the events underlying the statement or the matter asserted therein. *See* 4 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 419, at 179-80 (1980).

A.T. testified at trial and answered questions on cross-examination. Over the course of two days, the defense asked A.T. approximately 348 questions on cross-examination, covering nearly fifty-one pages of trial transcript. On the first day, A.T. answered all of the questions posed to her, all of which were background questions or otherwise not directly related to her allegations of abuse.

Cross-examination on the second day was more difficult. The defense asked about 249 questions, approximately sixty-six of which elicited no audible or discernible response. Defense counsel began by asking A.T. about her meetings with the prosecutor on Tuesday, the day between her first and second days of cross-examination. A.T. acknowledged that she met with the prosecutor for a short period of time but was very reluctant to discuss the content of those conversations, generally stating that she did not remember the specific things they talked about. Except for a few questions about her conversations with the prosecutor, however, A.T. eventually responded to the substance of all of the defense's inquiries.[8]

Thereafter, defense counsel began asking A.T. about her allegations of abuse. After a few questions, the dis-

[8] We note that when A.T. initially failed to respond, the questions often concerned seemingly irrelevant material. For example, the record contains a series of eight questions about whether A.T. ever helped her grandfather care for his sheep. Five of those questions yielded no audible response; the other three established that A.T. could not remember helping to take care of her grandfather's sheep.

trict court called for a recess and made observations on the record about A.T.'s testimony on cross-examination.[4] When questioning resumed, defense counsel asked A.T. many questions about to whom she may have mentioned the abuse, and A.T. answered all but a few of those questions. Her answers ranged from specifically acknowledging or denying making certain statements to claims of forgetfulness. Although she failed to respond initially to this line of questioning, it often was the result of imprecise cross-examination. For example, defense counsel asked A.T. four times whether she remembered talking to a counselor, and four times failed to elicit an audible response, before learning that A.T. did not know what a counselor was. At one time, the court admonished de-

[4] The court stated:

> The record should reflect that when questions are asked of this witness, the questions which she has answered, that the answers are given reasonably quickly, that is within two, three or four seconds in most cases.
>
> But in many cases where a question is asked and the witness does not respond, she has not responded except—excuse me. It has—integrals [sic] of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds.
>
> I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 second, many times 20 seconds, 25 seconds. And I've been timing that with my watch.
>
> * * * *
>
> We have a very unusual situation insofar as this witness is concerned. I would note also on the record that when we started this recess, the witness seemed to be losing concentration. She would look up to the ceiling, would look to the back of the courtroom, she would look over my head, would not in instances face counsel who is inquiring of her.
>
> She twisted and turned, stretched a little bit sometimes. At other times she would put her hand to her mouth and clasp her lips with her hand. We have a very difficult situation here.

fense counsel, suggesting that the questions might be too complicated for the six- and one-half-year-old witness.

We are mindful that Rule 801's cross-examination requirement "should not be viewed as an empty formalism which can be satisfied by the mere fact that the witness is present and can be required to sit still long enough for questions to be put." *Id.* at 181. Nevertheless, we conclude that A.T. was subject to cross-examination concerning her prior statements alleging abuse. Although A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions. Our reading of the record reveals that A.T. responded to simple and specific questions about specific persons. Indeed, Tome does not identify any specific topic or issue that he feels was important but about which A.T. would not respond. In short, A.T. did willingly respond to Tome's inquiries on cross-examination.

In addition, where the witness answers numerous questions regarding the prior statements, all of the purposes of cross-examination are served. Cross-examination under oath insures that the factfinder can observe the witness's demeanor while responding to questions in a formal setting. It also enables the defense to probe the circumstances under which the statement was made in order to call into question the accuracy or sincerity of the earlier statement. Those conditions clearly resulted from Tome's cross-examination in this case. Moreover, when the child witness answers some but not all of the questions, the factfinder may have an even greater insight into the witness because it can observe the witness's demeanor while both answering and remaining silent. Under these circumstances, we find that A.T.'s general responsiveness and the jury's ability to observe her demeanor on the stand made her "subject to cross-examination" for purposes of Rule 801.

(2) Implied Charge of Recent Fabrication

Tome next contends that Rule 801 was not applicable because defense counsel did not charge A.T. with recent fabrication or improper motive. It is true that "not every attempt to impeach a witness's credibility constitutes a charge of fabrication." *Gaines v. Walker*, 986 F.2d 1438, 1444 (D.C.Cir. 1993); *see also United States v. Cherry*, 938 F.2d 748, 755 (7th Cir.1991). The trial court has discretion, however, to determine whether the prior consistent statement is offered for such a purpose. *See United States v. Herring*, 582 F.2d 535, 541 (10th Cir.1978); *see also United States v. Montague*, 958 F.2d 1094, 1098 (D.C.Cir.1992).

In this case, the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother. Defense counsel questioned A.T. at length regarding her preference for living with her mother. A.T. testified that she had friends in Colorado but none in New Mexico, and that she missed her mother when in New Mexico but did not miss her father when in Colorado. Because this line of questioning attacked more than her general credibility or memory, we find that the district court did not abuse its discretion in concluding that the defense had impliedly charged A.T. with fabricating the abuse. *See United States v. Red Feather*, 865 F.2d 169, 171 (8th Cir.1989) (applying Rule 801(d)(1)(B) where defendant implied on cross-examination that child sexual abuse victim was coached by social services counselors and was prejudiced against her father because of prior punishment and discipline); *see also State v. Newman*, 242 Mont. 315, 790 P.2d 971, 975 (1990) (applying state version of Rule 801 where defense repeatedly referred to child sexual abuse victim's possible motives for falsely accusing defendant).

(3) The Pre-motive Rule

Finally, Tome contends that Rule 801(d)(1)(B) does not apply because all of the prior statements were made after A.T.'s alleged motive to fabricate a story of abuse arose. Whether the rule includes such a limitation is an issue of first impression in this circuit.[5] The proper interpretation of the rule is a question of law which we review de novo.

While we have not yet had occasion to decide this issue, it has divided the other circuits for years. Although the text of the rule is silent on this point, some circuits require that the declarant's prior consistent statement precede the time that the alleged motive to lie arose. *See, e.g., United States v. Guevera*, 598 F.2d 1094, 1100 (7th Cir. 1979); *United States v. Quinto*, 582 F.2d 224, 234 (2d Cir.1978). Other circuits reject the so-called "pre-motive rule" and do not require the prior consistent statement to precede the alleged motive to lie. *See, e.g., Montague*, 958 F.2d at 1098; *United States v. Pendas-Martinez*, 845 F.2d 938, 942 n. 6 (11th Cir.1988); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. Unit B, June 1981).[6] We too reject the pre-motive rule and

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[5] The government contends that this circuit rejected the pre-motive rule in *United States v. Rios*, 611 F.2d 1335 (10th Cir. 1979). *cert. denied*, 452 U.S. 918, 101 S.Ct. 3054, 69 L.Ed.2d 422 (1981). The pre-motive rule, however, was not at issue in that case. Rather, *Rios* involved the use of prior consistent statements to counteract the defense's cross-examination regarding the witness's prior inconsistent statement. *Id.* at 1349. The issue was whether the prior consistent statement had to precede the prior inconsistent statement; we said no. *Id.* While discussing the "order" of certain evidence under the Rule, we did not discuss the witness's motives at the time of making the earlier statements.

[6] Because the government offered the statements for their full substantive effect, we do not examine the applicability or interpretation of Rule 801(d)(1)(B) with respect to statements offered only to rehabilitate the live testimony. *See United States v. Casoni*, 950 F.2d 893, 905 (3rd Cir.1991).

decline Tome's invitation to limit Rule 801(d)(1)(B)'s scope to statements made prior to the existence of the declarant's motive to fabricate.

Those courts that have adopted the premotive rule reason that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same for the simple reason that mere repetition does not imply veracity." *United States v. Harris*, 761 F.2d 394, 399 (7th Cir.1985) (internal quotation omitted). This may be true. As articulated, however, the pre-motive requirement is a function of the relevancy rules, not the hearsay rules. *See Montague*, 958 F.2d at 1098; *United States v. Miller*, 874 F.2d 1255, 1272 (9th Cir.1989). But even as a function of relevance, the pre-motive rule is clearly too broad: a per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.[7]

In rejecting the pre-motive rule, however, we do not overlook or devalue the veracity concerns which underlie the rule. To the contrary, we recognize that prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar. To determine whether a statement has probative value apart from its repetition, we follow the approach taken by the Ninth Circuit in *Miller*.[8] *Miller* treats a de-

[7] Indeed, courts that have adopted the pre-motive rule appear to factor such information into the equation when determining whether a sufficient motive to lie arose. *See, e.g., Cherry*, 938 F.2d at 756.

[8] The statements at issue in *Miller* were offered only to rehabilitate the trial witness's testimony, not for the truth of the matter asserted. 874 F.2d at 1272. The court, however, held that the standards for admission under Rule 801(d)(1)(B) are the same whether the evidence is offered substantively or for rehabilitation. *Id.* at 1273. The analysis, therefore, applies equally to the admission of prior statements as substantive evidence.

clarant's motive to lie as only one factor—albeit a crucial one—to be considered when evaluating the relevancy of a prior consistent statement under Federal Rules of Evidence 402 and 403. *Id.* at 1274. In doing so, "the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant 'probative force bearing on credibility apart from mere repetition.'" *Id.* (quoting *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir.1986)).

In *Miller*, the court applied this test to the out-of-court statements of two witnesses. The case involved the espionage prosecution of Richard Miller, an agent for the Federal Bureau of Investigation who delivered classified documents to two emigrees from the Soviet Union, Svetlana and Nikolay Ogorodonikova. Svetlana testified during Miller's trial that Miller had never shown or given her a classified document. When the government attempted to impeach that testimony, Miller sought to rehabilitate her testimony through evidence of seven prior consistent statements made by Svetlana. After rejecting a strict pre-motive requirement, the court affirmed the exclusion of the statements. The court found that, because all of them were made to federal agents or defense attorneys while she was under criminal investigation or indictment, her motive to fabricate was "powerful," thus stripping the "self-serving" statements of "any significant probative value." *Id.* at 1274.

In contrast, the court affirmed the admission of prior consistent statements made by Marta York, a government witness and Miller's ex-lover. York testified that Miller had told her that he had given one classified document to his "Soviet girlfriend." *Id.* at 1275. When the defense attacked that testimony on cross-examination, the govern-

ment sought to rehabilitate her testimony by introducing evidence that she had repeated Miller's claim to a friend. The defense contended that the prior consistent statement was not relevant because York was upset about her broken love affair with Miller and thus had a motive to lie. *Id.* The court found that the prior statement, which was made spontaneously, was subject to only a speculative motive to fabricate and had enough probative value independent of its consistency with the witness's trial testimony to be presented to a jury. *Id.* Similarly, in *United States v. Payne*, 944 F.2d 1458, 1471 (9th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1598, 118 L.Ed.2d 313 (1992), the court addressed the admissibility under Rule 801(d)(1)(B) of prior consistent statements made by a sexually abused foster child. The defense argued that the victim "may have been angry" at the defendant and therefore "falsely accused him for revenge." *Id.* at 1471 n. 12. The court, however, affirmed the admission of the prior consistent statements, finding that the alleged motive to lie was too speculative. *Id.* at 1471.

Applying this analysis to the present case, we conclude that the district court properly admitted evidence of A.T.'s prior consistent statements under Rule 801(d)(1)(B). The record reveals that A.T. spontaneously made her initial allegation of abuse to her baby-sitter. On cross-examination, Tome implied that A.T. fabricated the allegations about her father because she wanted to live with her mother. Although this argument does present some motive to lie, we do not believe that it is a particularly strong one. *See Payne*, 944 F.2d at 1471. Moreover, Tome's contention would require us to believe that A.T.'s statements were the result of a calculated scheme to deceive. Yet Tome has presented no evidence that the five-year old A.T. possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme. *See id.; see also State v. Robinson*, 611 A.2d 852, 858 (Vt.1992) (finding defense's claim that child fabricated story of sexual abuse because of attention he received from it highly speculative). Under these circumstances, we believe that A.T.'s consistent statements do carry probative force apart from mere repetition.[9] We therefore find no abuse of discretion in admitting these prior consistent statements.[10]

B. *Confrontation Clause*

Tome contends that, even if the testimony concerning A.T.'s out-of-court statements was admissible under the Federal Rules of Evidence, its admission nevertheless violated his constitutional rights under the Sixth Amendment's Confrontation Clause.[11] We review claims under the Confrontation Clause de novo. *See United States v. Ellzey*, 936 F.2d 492, 495 (10th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 400, 116 L.Ed.2d 350 (1991).

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987). Although an out-of-court statement related by a witness at trial constitutes "testimony" against the accused, "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant

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[9] We do not decide whether this result would obtain where the defendant presents evidence of "coaching" by a parent or relative. Although Tome makes stray accusations that A.T.'s mother coached A.T. into making these statements, he does not rely on that argument and cites no evidence in the record in support of that assertion.

[10] Tome did not object that the admission of *all* of these statements together rendered them more prejudicial than probative under Fed.R.Evid. 403, and we find no plain error.

[11] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

is testifying as a witness and subject to full and effective cross-examination." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). Here, the out-of-court declarant, A.T., was physically present on the witness stand for cross-examination. Tome contends, however, that his right to conduct cross-examination was violated because the witness did not respond sufficiently to his questions. We disagree.

It is clear that "simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." *United States v. Spotted War Bonnett*, 933 F.2d 1471, 1474 (8th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1187, 117 L.Ed.2d 429 (1992); *see United States v. Dorian*, 803 F.2d 1439, 1446 (8th Cir.1986) (concluding that five-year-old witness was unable to testify meaningfully because of age and fright); *see also Commonwealth v. Kirouac*, 405 Mass. 557, 542 N.E.2d 270, 272-74 (1989) (witness resisted answering nearly all questions asked during cross-examination). Ours is not, however, a situation where the child witness was unable to answer questions on the stand. Rather, as discussed above, the record includes fifty-eight transcript pages of A.T.'s cross-examination during which she was generally responsive. Tome nevertheless challenges the sufficiency of the cross-examination because, in response to a number of questions, A.T. either gave no audible response or testified that she could not remember many things.

The Confrontation Clause "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985). The concerns animating the Confrontation Clause are satisfied as long as the defendant has the opportuninty to expose weaknesses in the witness' testimony. *See Owens*, 484 U.S. at 559, 108 S.Ct. at 842; *see also Kentucky v. Stincer*, 482 U.S. 730, 744, 107 S.Ct. 2658, 2667, 96

L.Ed.2d 631 (1987). Forgetfulness, for example, does not render cross-examination constitutionally infirm because the defense can use the witness's poor memory and trial demeanor to attack the witness's credibility. *Owens*, 484 U.S. at 559-60, 108 S.Ct. at 842-43; *Fensterer*, 474 U.S. at 20, 106 S.Ct. at 295. In this case, the defendant likewise had the opportunity to mount a successful attack against the partially nonresponsive witness and, in fact, rarely missed an opportunity to comment on the difference between A.T.'s testimony on direct and on cross-examination. Therefore, notwithstanding A.T.'s failure to respond to some questions on cross-examination, we find that Tome's rights under the Confrontation Clause were not violated because A.T.'s testimony provided him a sufficient opportunity to discredit her out-of-court statements.

III. Use of Leading Questions

The trial judge permitted the government to use leading questions during A.T.'s direct examination. We review that decision for an abuse of discretion. *See United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1570 (10th Cir.1993). "In this realm the widest possible latitude is given to the judge on the scene." *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 12 (1st Cir.1993).

Fed.R.Evid. 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." This circuit has long recognized the necessity of using leading questions to elicit testimony from child sex abuse victims. *See Antelope v. United States*, 185 F.2d 174, 175 (10th Cir.1950). Indeed, the Advisory Committee Notes to Rule 611(c) expressly identify the examination of child witnesses as an exception to the general prohibition on the use of leading questions during direct examination. Fed.R.Evid. 611(c) advisory committee's note; *see also United States v. Castro-Romero*, 964 F.2d 942, 943-44 (9th Cir.1992) (leading question used during direct examination of 8-year-old sex abuse victim).

In this case, A.T.'s direct examination did involve a significant number of leading questions. It is evident from the record, however, that A.T. was reluctant to testify about her abuse. In fact, questioning was halted several times in order for A.T. to regain her composure and willingness to discuss the events at issue. The defense twice objected to the leading questions; both times the district judge decided to permit them. Under these circumstances, we cannot say that the district court abused its discretion in determining that leading questions were necessary to develop A.T.'s testimony.

VI. Cumulative Error and Fundamental Unfairness

Finally, Tome argues that "[t]his Court need not decide whether the individual errors discussed herein require reversal of Tome's conviction; it is clear that the cumulative effect of those errors rendered the trial in this case fundamentally unfair." We interpret this assertion to raise two distinct arguments.

First, Tome appears to make a preemptory strike at a potential harmless error analysis. In this regard, he contends that, even if the alleged trial errors were individually harmless, they were not harmless in the aggregate. This argument is unavailing, however, because we already have concluded that the trial court's individual rulings were not erroneous. "[A] cumulative-error analysis aggregates only *actual errors* to determine their cumulative effect." *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir.1990) (emphasis added); *see also United States v. Haar*, 931 F.2d 1368, 1377 (10th Cir.1991) (effect of non-errors not included in aggregation).

Second, we interpret Tome's argument to challenge the "fundamental fairness" of his trial under the Due Process Clause of the Fifth Amendment. A trial is fundamentally unfair under the Fifth Amendment's Due Process Clause if it is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643,

36 L.Ed.2d 366 (1973) (internal quotation omitted). In *Rivera*, we noted that courts may consider prejudicial circumstances that do not amount to error in the course of reviewing for fundamental unfairness, but only when actual error has also occurred. 900 F.2d at 1477. Thus, "the linchpin of the analysis seems to be that an error was committed which, when considered with other circumstances, led to a fundamentally unfair trial." Id.

Here, as in *Rivera*, Tome requests a fundamental unfairness analysis without any actual error on which to hang his proverbial hat. Tome contends that this is a case where the government's scripted evidence, introduced through leading questions, and the defense's inability to cross-examine the source of that evidence combined synergistically to deny the defendant a fair trial. However, we already have approved of the use of leading questions in this case and have determined that A.T. was available for cross-examination under both Rule 801 and the Confrontation Clause. Moreover, the record reveals that the defendant presented his own witnesses and evidence while mounting a continuing attack on the credibility of the goverment's witness, A.T. included. The fact that a number of important evidentiary issues were decided against him, and that the jury chose to believe the government's witnesses rather than his, simply does not shock any universal sense of justice. Tome's trial, though not perfect, was fair.

We AFFIRM.

SUPREME COURT OF THE UNITED STATES

No. 93-6892

MATTHEW WAYNE TOME,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

February 22, 1994